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In the Supreme Court of the United States

OCTOBER TERM, 1996

MOBILETEL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Until 1994, the Federal Communications Commission reserved one of the two cellular telephone licenses in each market for a company that provided "landline message telephone service" in "some portion of the cellular market." 47 C.F.R. 22.902(b) (1988). The question presented is whether the FCC properly interpreted its regulations relating to the "landline" set-aside when it ruled that a telephone company that provided service to a market only through radio links was not eligible for the "landline" license in that market.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 107 F.3d 888. The opinion and order of the Federal Communications Commission (Pet. App. 16a-37a) is reported at 11 F.C.C.R. 19,098.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1997. A petition for rehearing was denied on April 29, 1997. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on July 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When the Federal Communications Commission (FCC or Commission) established rules to govern the implementation of cellular telephone service in 1981, it divided the cellular spectrum into two frequency blocks, labelled "A" and "B." The Commission set aside the B-Block licenses for what it termed "wireline" applicants—*i.e.*, common carriers that provide "public landline message telephone service." 47 C.F.R. 22.902(b) (1988); see *Cellular Communications Systems*, 86 F.C.C.2d 469, 487, 490, 493 (1981) (*Cellular Order*) (referring to "wireline" applicants and blocks), modified, 89 F.C.C.2d 58 (1982) (*Cellular Reconsideration*), further modified, 90 F.C.C.2d 571 (1982), petition for review dismissed *sub nom. United States* v. *FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983). The A-Block licenses were reserved exclusively for non-wireline applicants.

The wireline set-aside was intended to expedite service to the public by ensuring that one license in every market would be held either by AT&T (at that time still an integrated enterprise providing local service throughout much of the country) or by another local provider of landline exchange service. AT&T had developed cellular technology, and all of the local wireline companies had experience in managing telephone traffic and in designing and operating local switching networks. That technical expertise was expected to translate into prompt service. *Cellular Order*, 86 F.C.C.2d at 488-490; *Cellular Reconsideration*, 89 F.C.C.2d at 70.

In licensing other types of mobile services, the Commission had established wireline set-asides under which a wireline carrier was eligible to hold the

wireline license in any market, without regard to whether it provided wireline service in that market. See *In re Bonduel Telephone Co.*, 68 F.C.C.2d 497 (1978). In establishing the cellular rules, however, the Commission specifically limited the availability of B-Block licenses to wireline carriers that provide landline service in at least some portion of the relevant cellular market.[1] That approach was, in the Commission's view, "the best way to attain [the Commission's] goals of making cellular service available to the public as rapidly as feasible while still promoting competition to the extent possible." *Cellular Reconsideration*, 89 F.C.C.2d at 76. Because very few companies in each market would have the required local landline telephone presence, there would be little need for lengthy comparative proceedings to select the B-Block licensee, thus reducing delays in the introduction of service. *Cellular Order*, 86 F.C.C.2d at 490 & n.56.

In 1983, the Commission switched from a comparative hearing process to a lottery process for the selection of cellular licensees. In connection with that change the Commission reconsidered the desirability of the wireline set-aside, and decided to retain it. The Commission determined that eliminating the set-aside could adversely affect the provision of basic telephone service in rural areas, if local landline companies lost customers and revenue to a competing cellular carrier. In addition, the wireline set-aside rules

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[1] The relevant rule provided that "[c]ommon carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market." 47 C.F.R. 22.902(b) (1988).

had precluded small landline companies from holding licenses outside their landline areas, and the Commission concluded that opening the B-Block lotteries to any applicant would unfairly lower local companies' chances of winning the lottery in their own landline territories. Finally, by reducing the number of applicants for licenses, the set-aside and market-presence requirements had helped encourage settlement agreements among mutually exclusive applicants, thus speeding service to the public, and that benefit was expected to continue under a lottery licensing process. *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175, 194-197 (1984), modified, *Cellular Lottery Reconsideration Order*, 101 F.C.C.2d 577 (1985), aff'd in relevant part *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

2. Petitioner MobileTel, Inc., is affiliated with Lafourche Telephone Company, a landline service provider in the Houma-Thibodaux, Louisiana, cellular market. That affiliation makes petitioner eligible to hold the B-Block wireline license in the Houma-Thibodaux market, which it does. In October 1988, petitioner applied for the B-Block licenses for two additional Louisiana cellular markets known as St. James and Plaquemines, which are adjacent to Houma-Thibodaux. Pet. App. 5a.

Lafourche does not provide any telephone service in the St. James and Plaquemines markets using actual wire connections. Shortly before applying for cellular licenses in those markets, Lafourche began providing radio-based telephone service to one subscriber in each market under a system known as Basic Exchange Telecommunications Radio Service (BETRS). Pet. App. 5a, 18a-19a. BETRS allows local exchange companies to use radio loops in place of wire

or cable to extend telephone service to remote or rugged areas where the installation of conventional hard-wired connections is prohibitively difficult or expensive. See *In re Basic Exchange Telecommunications Radio Service*, 3 F.C.C.R. 214 (1988). The Commission considers BETRS an alternative to "wireline" service, and the FCC rules in effect at the time Lafourche commenced service required applicants for BETRS licenses to show "why it [was] impracticable to provide the required communication service by means of wireline facilities." 47 C.F.R. 22.609(a) (1988).

Petitioner won the lottery for the St. James and Plaquemines B-Block licenses. The losing applicants asked the FCC to deny petitioner's applications on the ground that petitioner's BETRS radio links—its only presence in those two markets—did not satisfy the requirement that a B-Block licensee provide "landline service in some portion of the cellular market." 47 C.F.R. 22.902(b) (1988).

The FCC's mobile services division (MSD) initially rejected that objection and granted petitioner licenses for the two markets. Pet. App. 38a-46a. Because BETRS is "an extension of intrastate basic exchange service * * * [in which] radio loops can take the place of expensive landlines," the MSD reasoned that "the Commission's intent in establishing the wireline set aside would be to allow a wireline carrier which provides BETRS service to qualify for a Block B license." *Id.* at 44a.

The Commission reversed the MSD's order. Pet. App. 16a-37a. Rejecting the argument that the term "landline" as used in the eligibility rule included exclusively radio-based services such as BETRS, the Commission found it "evident" from other contexts

that it had "consistently use[d] the term to describe the provision of wireline service" as opposed to radio-based service. *Id.* at 27a. For example, the Commission's regulations define the term "wireline" carrier to mean one that provides "public landline telephone service," *id.* at 28a (citing 47 C.F.R. 22.99 (1996)), and the Commission had previously held that a B-Block applicant that provided telephone service in a market by means of radio links was not eligible for the set-aside license because "[a]s a provider of radio service, [it did] not comply with the plain meaning of the 'public *landline* service' requirement," *id.* at 29a (quoting *In re Offshore Telephone Co*, 3 F.C.C.R. 4601, 4601 (1988)) (emphasis supplied in *Offshore*). In keeping with *Offshore*, the Commission held that although "BETRS service is similar in functional respects to * * * local exchange wireline services," that similarity "does not affect the service's status as a radio service." *Id.* at 31a-32a.

The Commission also determined that the policies behind the wireline set-aside supported the rejection of petitioner's application for a B-Block license. Pet. App. 32a-34a. "A central purpose of [the Commission's] rule was to expedite the provision of cellular service to the public by reducing the number of applicants for one of the frequencies." *Id.* at 32a. Allowing radio-based carriers to apply for licenses would undermine that goal, whereas "by strictly adhering to the requirements of [its] rule, [the Commission could] strike the balance that is most consistent with the rule's multiple objectives." *Id.* at 33a-34a. Finally, the Commission expressed concern that, because "BETRS service is inexpensive to provide in comparison to landline service," *id.* at 34a, recognizing BETRS service as an alternative to land-

line service for purposes of the wireline set-aside "could invite carriers in adjacent markets to * * * provid[e] a very small amount of BETRS service in the relevant market [simply] in order to secure wireline eligibility," *ibid.*, without in fact furthering the goals of either the BETRS program or the set-aside.

3. The court of appeals affirmed the Commission's order. Pet. App. 1a-15a. The court recognized that it should "accept the agency's interpretation [of its own regulation] unless it is 'plainly wrong.'" *Id.* at 8a. Although it held that it could not resolve the case "solely on the basis of the 'plain meaning' of the word 'landline,'" *id.* at 10a, the court concluded that the policies underlying the set-aside supported the Commission's decision.

The court first observed (Pet. App. 10a-11a) that granting petitioner cellular licenses in the two markets at issue would not serve the goal of "benefit[ing] small telephone companies with a presence [in] a local market—companies with local expertise and experience, that could be squeezed out of business," because "the sum and substance of [petitioner's] 'presence' and 'experience' in the [relevant markets] was the extension of radio service to *one* customer in each [market]—and even these minimal excursions were set up just in time to support [petitioner's cellular license] applications." Barring applicants that provide only BETRS service in a market would also serve "[t]he Commission's additional rationale based on its desire to minimize the number of competing applicants for each [market]." *Id.* at 11a. Thus, "the Commission's construction of the term 'landline' [was] consistent with several of the[] policies" underlying the wireline set-aside, and "only the Commis-

sion may decide how much precedence particular policies will be granted when several are implicated." *Ibid.*

The court also rejected (Pet. App. 11a-12a) petitioner's arguments that the Commission's interpretation of its set-aside regulation was incompatible with its authorization of BETRS service; that declining to extend set-aside eligibility would "punish[]" carriers that set up BETRS links; and that the introduction of BETRS technology had "implied a radical alteration in the definitions of the terms 'landline' and 'wireline.'" Finally, the court held that the Commission's refusal to waive the B-Block eligibility requirements in petitioner's case was justified, "particularly in light of the fact that [petitioner's] extension of local service in the [relevant markets] was extremely limited in tenure and scope, and thus [petitioner] was distinctly not in the genre of companies that the Commission intended for the set-aside to benefit." *Id.* at 12a. For these reasons, the court found the Commission's interpretation of its regulations to be "reasonable and consistent with several of the Commission's relevant policies," and it "easily conclude[d]" that that interpretation "was not 'plainly wrong.'" *Ibid.*

In a petition for rehearing, petitioner argued that the Commission had improperly failed to follow the same interpretive approach to the wireline set-aside that it had taken in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), and that it had "ignored its own policies and the technologies used to provide local service." See Pet. App. 47a-48a. In denying rehearing, the court of appeals noted that petitioner had not articulated its change-of-position contentions until oral argument, but that the court's opinion had

nonetheless addressed and rejected those contentions. *Ibid.*

ARGUMENT

1. Petitioner does not challenge the court of appeals' conclusion (Pet. App. 12a) that the FCC's interpretation of the term "landline," as used in the Commission's wireline set-aside eligibility regulation, is "reasonable and consistent with several of the Commission's relevant policies." Instead, petitioner argues (Pet. 11-20) that the court erroneously "confined its review" to that question, when it should instead have "require[d] an explanation" for an alleged "shift in approach" by the Commission in interpreting its regulation (Pet. 12). That claim does not warrant review.

To begin with, petitioner never made its present argument (that the Commission has impermissibly changed a prior position without "acknowledg[ing] the change and provid[ing] a reasoned explanation," Pet. 16) either to the Commission, as required by 47 U.S.C. 405(a) as a "condition precedent to judicial review," or in its briefs in the court of appeals. As the court noted in denying rehearing (Pet. App. 47a), petitioner did not articulate that contention until oral argument below. It is not appropriately elaborated for the first time in a petition for review by this Court.[2]

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[2] Although petitioner claims (Pet. 11 n.4) to have raised its argument before the court of appeals, it concedes (*ibid.*) that the cited portion of its brief merely discussed earlier Commission decisions "in the context of arguing that the Commission's [present] decision was 'plainly w[ro]ng.'" That is hardly the same thing. We note, for example, that petitioner's brief in the court of appeals does not cite *Motor Vehicles Manufacturers Association of the United States, Inc.* v. *State Farm Mutual*

In any event, petitioner's argument is without merit. As the court of appeals noted, the Commission's decision in *In re Offshore Telephone Co.*, 3 F.C.C.R. 4601 (1988), which was issued two months before petitioner's affiliate began its limited BETRS service in the markets at issue here, "announced * * * that the provision of exclusively *radio*-based service in [a relevant market] does not render a company eligible for the 'wireline set-aside.'" Pet. App. 14a. The Commission likewise pointed out, in its decision in this case, that "the core holding of *Offshore* rests on our determination that a provider of 'radio' service does not provide 'landline' service." *Id.* at 29a. Petitioner was presumably aware of the *Offshore* decision at the time it began BETRS service and applied for the licenses presently in dispute, because its parent company was a party to the case. *Id.* at 14a.[3] Thus, the decision in this case, far from being a dramatic and unexplained departure from prior practice, followed naturally, as both the Commission and the court of appeals recognized, from

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Automobile Insurance Co., 463 U.S. 29 (1983), on which its petition in this Court principally relies. Similarly, petitioner's appellate brief contains only a passing reference to the FCC's decision in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), which petitioner now claims "exemplifies" (Pet. 16) the approach that the Commission is alleged to have abandoned.

[3] That is one reason why there is no merit to petitioner's claim (Pet. 14) that it has been treated unfairly because it was somehow misled into applying for the wrong type of license. The other is that, under 47 C.F.R. 22.902(b) (1988), a landline carrier was eligible to apply for cellular licenses only in markets in which it provided landline service. Thus, under no circumstances could petitioner (which was affiliated with a landline carrier) have applied for an A-Block license in the markets at issue here.

a decision issued eight years earlier—albeit one that petitioner fails to cite.

The decision in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), on which petitioner relies (Pet. 17-19), is not to the contrary. The question in that case was whether a long-distance service provider was eligible to hold a non-wireline cellular license. The company did not own local telephone facilities, but its long-distance lines were connected to local facilities owned by local telephone companies. The Commission reviewed the history and policies behind the wireline set-aside and determined that the long-distance carrier did not provide landline exchange service for purposes of eligibility for the set-aside. 90 F.C.C.2d at 552-554.

Nothing in *Xerox* supports petitioner's contention (Pet. 19) that in this case the FCC impermissibly "abandoned" a different "decisionmaking approach" that it had used in the past. To the contrary, as the court of appeals observed, "in *Xerox* (as in the action under review) the Commission * * * considered the policies underlying its regulations in order to determine how the regulations should be construed." Pet. App. 47a-48a. *Xerox* did not discuss the technology used by the applicant, because in that case the technology had no bearing on the outcome. In this case, by contrast, the question before the Commission was whether the very limited BETRS service initiated by petitioner in the markets in question satisfied either the letter or the spirit of the Commission's wireline set-aside eligibility requirement.

Thus, the FCC did not depart from its own precedents in reaching its decision in this matter. See Pet. App. 27a-31a. Indeed, the court of appeals specifically recognized that the Commission's decision is consistent with policies the Commission had previously

articulated for its set-aside eligibility rule (*id.* at 10a-12a), and that "a good faith prospective applicant for the Block B frequencies [for which petitioner applied] would * * * have understood that the provision of only BETRS-based service * * * would not create eligibility" (*id.* at 14a). This case therefore raises no "important question concerning * * * the extent to which Article III courts should require federal agencies to provide a reasoned explanation when adopting new or different interpretations of existing regulations" (Pet. 11)—a proposition that neither the Commission nor the court of appeals questioned. See *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

2. In 1994, the Commission eliminated the wireline set-aside at issue in this case on the ground that it had become "obsolete and unnecessary." *In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order*, 9 F.C.C.R. 6513, 6514 (1994). The Commission found that, by that time, the licensing process had been completed in "almost all" of the larger cellular markets and in "most" of the smaller ones. *Id.* at 6514 n.3. The "near completion of [the] initial cellular licensing process" had therefore "rendered * * * [the] initial cellular licensing rules obsolete." *Ibid.*; see also *In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Notice of Proposed Rulemaking*, 7 F.C.C.R. 3658, 3672-3673 (1992) ("Once both eligible carriers * * * have been authorized, the purpose of the set-aside has been served and the maintenance of the set-aside rule is no longer justified."). The present dispute thus concerns the application of superseded rules to a single

remaining license applicant in circumstances that are extremely unlikely to recur. The matter is therefore of no continuing importance, and does not warrant review by this Court.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner argues (Pet. 12) that the Commission "continues to employ * * * set-asides, most recently auctioning billions of dollars of spectrum to limited classes of eligible entities." Although petitioner does not elaborate, it may be referring to the set-aside for small businesses in a recent licensing proceeding for a new mobile communications service. See *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996) (describing small-business set-aside). That set-aside program implemented a specific statutory directive, see 47 U.S.C. 309(j)(3)(B), and it has nothing to do with the wireline set-aside at issue here.